No. 15741

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRWIN ARAN d/b/a AUTO NURSE MANUFACTURING COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

REPLY BRIEF OF APPELLANT.

ROBERT M. ARAN,
15113 Sunset Boulevard,
Pacific Palisades, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TABLE OF AUTHORITIES CITED

Cases

Regulation

Statutes

No. 15741

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRWIN ARAN d/b/a AUTO NURSE MANUFACTURING COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

REPLY BRIEF OF APPELLANT.

The appellee has failed to answer our contentions in this case. It argues that the lower court did not err by its decision that baby bottle warmers specifically made for the use and convenience of parents with small children and not for automobiles as a general class are parts or accessories of a motor vehicle as defined by Section 3403(c) of the 1939 Internal Revenue Code, simply because it may be used by drawing energy from the automobile to heat the bottle.

Appellee cites as its authority for such an interpretation the very Treasury Regulation which the appellant has attacked as an unreasonable interpretation of the statute upon which it is allegedly based.

Appellee points to no decision which would make this Treasury Regulation the law, nor to any decision that only Congress could alter the effect of a Treasury Regulation of long standing. To the contrary, the rule cited by appellee is no more than an aid in statutory construction, without the legal effect of binding any competent Court thereto. Where, as here, a statute has been incorrectly applied by an administrative regulation, the Court has the power to declare an important application, and basis for this Treasury Regulation. (*United States v. Missouri Pacific Railroad,* 278 U. S. 269, 73 L. Ed. 322.)

Where construction of a statute is doubtful, or where not uniform, any weight to administrative interpretation is inapplicable. (*United States v. Missouri Pacific Railroad Co.* (*supra*).)

Appellee argues the long standing of this Treasury Regulation 46.316.55 amended by T. D. 5099, 1941-2 Cum. Bull. 267 as law, yet its own Treasury Department on February 4, 1955 in a ruling by its chief of the Excise Tax Division, and not by a subordinate employee, found appellant's baby bottle warmers NOT to be auto parts or accessories within the meaning of Internal Revenue Code, Section 3403(c), and the aforenamed treasury regulation. Are we then to infer that the Treasury Department activities in this field are outside the scope of Congressional approval, or are we to infer that in truth and fact this treasury regulation has not received such Congressional approval as the appellant would have us believe? Clearly the Treasury Department is confused as to the application of this allegedly long standing regulation. AND THIS CONFUSION HAS RESULTED IN THE IMPROPER TAXING OF BABY BOTTLE WARMERS AS AUTO PARTS OR ACCESSORIES.

Obviously the chief of the Excise Tax Division realized that TAX LAWS ARE TO BE INTERPRETED LIBERALLY IN FAVOR OF TAXPAYERS AND LANGUAGE USED MAY NOT BE EXTENDED BEYOND ITS CLEAR IMPORT (*Miller v. Standard Nut Margarine Co.,* 284 U. S. 498 at 508) and that ALL DOUBT MUST BE RESOLVED AGAINST THE GOVERNMENT AND IN FAVOR OF THE TAXPAYER. (*Miller v. Standard Nut Margarine Co.* (*supra*); *United States v. Merriam,* 263 U. S. 179; *Bowers v. N. Y. & A. Lighterage Co.,* 273 U. S. 346 at 350.)

As far as appellant can ascertain there are no rulings of the Treasury Department stressing the taxability of baby bottle warmers as auto parts or accessories. The only ruling we can point to in this regard is the one dated February 4, 1955, which was withdrawn after appellant made application for refund.

If as the appellee contends the Commissioner of Internal Revenue is not bound either by administrative interpretation or equitable estoppel to an erroneous construction of the law, so should the taxpayer be permitted to enjoy the same rights, and not be bound by an erroneous treasury regulation. (*Campbell v. Brown,* 245 F. 2d 662.)

The Treasury Department has construed the language of the statute, which is clear upon its face, to include as taxable as an auto part or accessory any article the primary use of which is in connection with a motor vehicle, whether or not essential to its operation, when in truth and in fact, no such language can be found in the statute, nor can any reasonable or logical interpretation to include or infer such effect be made.

We know this Honorable Court recognizes the rule that the LITERAL MEANING OF WORDS CAN BE INSISTED ON IN RESISTANCE TO A TAXING STATUTE. (*United States v. Armature Exchange, Inc.* (9th Cir.), 116 F. 2d 971.) The literal meaning of the words of Section 3403(c) of the 1939 Internal Revenue Code are not such as would tax all items used in or on an automobile or motor vehicle, as a part or accessory thereof. Congress intended to tax only those enumerated articles as parts or accessories whether primarily adapted for use as a part or accessory or not and as to all other taxable auto parts or accessories Congress merely said "Parts or accessories (other than tires and inner tubes and other than radio or television receiving sets) for any of the articles enumerated in subsections (A) or (B) . . ." (1939 I. R. C., Sec. 3403(c).)

Baby bottle warmers are not one of those enumerated articles which might be found to be a part or accessory whether primarily adapted for use as a part or accessory or not.

NOR ARE THEY PARTS OR ACCESSORIES FOR ANY OF THE ARTICLES ENUMERATED IN SUBSECTIONS (A) AND (B).

The appellee entirely ignores the facts that appellant's baby bottle warmers are accessories to parents with infant children and are not adaptable to automobile owners as a class. THE STATUTE DOES NOT SET FORTH ANY TEST FOR THE DETERMINATION OF WHAT IS OR IS NOT AN AUTO PART OR ACCESSORY. It is submitted that the test should look to the actual accomplishment of the item involved and the benefit it tenders to the motor vehicle in question.

Here the accomplishment is to warm a baby bottle, certainly this has nothing whatsoever to do with automobiles or motor vehicles. THE MERE FACT THAT ANY ITEM MAY

BE USED IN AN AUTOMOBILE AND USED THERE MORE OFTEN THAN OTHER PLACES IS NOT DECISIVE TO CLASSIFY THE ARTICLE AS AN AUTO PART OR ACCESSORY UNDER THE STATUTE INVOLVED HEREIN. (*McCaughn v. Electric Storage Battery Co.*, 63 F. 2d 715.)

IT IS THE PRIMARY AND CHIEF USE OF THE ARTICLE WHICH ESTABLISHES WHETHER OR NOT IT IS SUBJECT TO THE TAX. (*Perfection Gear Co. v. United States*, 41 F. 2d 561.) Here the primary and chief use of baby bottle warmers is to warm a baby bottle. In fact, it has other uses which they may be put to. BUT NONE OF THE VARIED USES OF BABY BOTTLE WARMERS EVEN REMOTELY HAVE ANYTHING TO DO WITH THE AUTOMOBILE AND THE FUNCTION, UTILITY OR ORNAMENTATION THEREOF.

WHERE DO WE STOP? ARE THERE NO BOUNDARIES FOR THIS STATUTE? COULD CONGRESS POSSIBLY HAVE INTENDED TO TAX EVERYTHING REMOTELY CONNECTED WITH AN AUTOMOBILE?

This writer thinks there must be a boundary and the Treasury Department cannot be permitted to continue to tax any item which in some manner deals with an automobile.

Appellee argues that baby bottle warmers are parts or accessories of automobiles because of the language of Section 3403(c) of the 1939 Internal Revenue Code as interpreted by Treasury Regulation 46.316.55 etc.

Webster defines Chassis as follows: THE FRAMEWORK OF A MOTOR CAR CARRYING THE BODY AND OTHER PARTS. Obviously, therefore, upon examination of Internal Revenue Code, Section 3403(c), it is readily observed that Congress imposed this tax upon Automobile Chassis and

other motor vehicle chassis. (See Subsecs. (A) and (B) thereof.) They did not intend the tax to extend to anything other than the framework or shell of the auto or motor vehicle. Certainly baby bottle warmers as manufactured by appellant have absolutely no connection with the framework or shell of the motor vehicle. How, therefore, can such a tax be imposed upon baby bottle warmers? The only answer is that the tax has been erroneously imposed upon the appellant's baby bottle warmers.

Appellee relies upon the *Universal Battery* case, 281 U. S. 580. (Appellee's Br. p. 9.) In so doing it cites out of context a certain statement made therein. By citing this excerpt out of context it destroys the true implications and intentions of the court when that decision was rendered.

In the first instance, that case was a decision based upon Section 900 of the 1918 Internal Revenue Code. This decision involved many cases of different articles with the same issue, namely, whether the article sold is a part or accessory within the meaning of that Section 900. The court said it must take all three sections of that statute together, and that the words parts or accessories had the same meaning in all the sections, and that the articles involved had the same meaning and relationship to the motor vehicle, AND THAT THEY WERE TAXED AS PARTS OR ACCESSORIES ONLY BECAUSE OF THIS RELATIONSHIP TO THE MOTOR VEHICLE.

We now have to examine what articles the Court had before it when talking about bearing a relationship to the motor vehicle in determining parts or accessories: (1) One of the items involved was storage batteries used in the operation of the auto; (2) Another involved Gears, Flexible shafts and flexible housing all being *replacement*

parts for a speedometer used on motor vehicles; (3) And base brackets and fittings used as replacement parts for bumpers on motor vehicles. So THE COURT IN THE *Universal Battery* case (*supra*) ACTUALLY HAD BEFORE IT PARTS IT CONSIDERED AS REPLACEMENT PARTS OF AN AUTO, and this is what it had in mind when it rendered its decision in the case cited by appellee. If appellant's baby bottle warmers are in some manner a replacement part or accessory of the auto or motor vehicle certainly the excise tax here involved applies, but unquestionably baby bottle warmers are not of that character and to impose the tax as here, is in error.

The Supreme Court's language in that case is important in determining their intention. They said that the scheme of taxation regarding all three sections under the statute center around the motor vehicles enumerated. *Their sale* is the principal thing that is taxed and the sale of parts or accessories for such vehicles is taxed because the part or accessory is within the same field with the vehicles and used to the same ends.

Since appellee contends there has been no change in the statute or the regulation, then the intention of the Supreme Court will only be carried out in taxing those items which bear this relationship the Court was referring to, namely, replacement parts or replacement accessories for motor vehicles.

None of the cases cited by appellee are in point and can each be distinguished on their facts in that they involve articles which bear an immediate relationship to the motor vehicle making it intimately connected thereto. On the other hand, the *Cuno Eng. Corp.* case, 43 F. 2d 259, and *Smith v. McDonald,* 214 F. 2d 920, manifest a clearer picture of the problem before this Honorable Court.

Conclusion.

Appellant's baby bottle warmers are not custom made for a motor vehicle, they are made solely for the convenience of parents with infant children, and not for motorists or motor vehicles as a class.

The findings of the lower court are not clearly supported by the evidence and in fact are based upon a Treasury Regulation which improperly interprets a statute which is clear upon its face.

Taxpayer has advertised these baby bottle warmers as the perfect baby gift and has so advertised them in Parents Magazine receiving thereon the Parents Magazine seal of approval, since appellee has argued that this Honorable Court can hardly be expected to find that the articles were not what taxpayer said they were in his own advertisement (Appellee's Br. p. 10), it is clear that appellee itself feels that baby bottle warmers are a perfect baby gift.

It is difficult to visualize an automobile accessory as a perfect baby gift.

The decision of the District Court is in part incorrect and should be overruled as to that portion of the judgment appealed from.

Respectfully submitted,

Robert M. Aran,

Attorney for Appellant.